# Ng Chooi Kor v Isyoda (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–693 OF 2004
SURIYADI, ZAINUN ALI AND AHMAD MAAROP JJCA
16 SEPTEMBER 2009

*Contract — Privity — Privity of contract — Agreement for supply of building materials and transport services — Whether there was privity of contract between appellant and respondent — Whether respondent's project co-ordinator was acting for and on behalf of respondent*

*Evidence — Documentary evidence — Admissibility of — Circumstances under which statutory declaration and affidavit were made — Whether statutory declaration and affidavit were consistent with evidence of respondent's witnesses — Whether real reason or motive for making statements may negate principle upon which admissibility was based — Evidence Act 1950 ss 32(1)(c) & 73A*

The plaintiff/appellant ('the appellant') was at all material times in the business of supplying building materials and providing transport services, while the respondent, a building and civil contractor, was at the material time appointed as the main contractor for various projects ('the projects'). The appellant commenced an action against the respondent for the sum of RM423,103.91 for the supply of building materials and the provision of transportation services. It was the appellant's case that he had supplied building materials and provided transportation services to the respondent for the projects, from July 1994 to mid-March 1995. The appellant pleaded that the respondent's request for the materials and services was made through the respondent's project co-ordinator, one Soo Kock Leong ('Soo'). The respondent denied requesting the appellant to supply building materials and provide transportation services for the projects as 70% of the works on the projects were sub-contracted to KTS Builders Sdn Bhd ('KTS'). The respondent also denied that Soo was its employee but that Soo was the director of KTS. The respondent's defence was that since the request for the appellant's materials and services was made by Soo, who was acting on behalf of the KTS and not the respondent, there was no privity of contract between the appellant and the respondent. In the court below this case was part heard before a judge, who heard the evidence of the appellant, his witness and six of the respondent's witnesses, before he went into retirement. The succeeding judge then continued the hearing of the case from where it was last adjourned by the first judge. In the course of that trial the appellant produced statements of account and various invoices for materials and services bearing

Soo's signature. However, two documents were admitted under ss 32(1)(c) and 73A of the Evidence Act 1950 which weighed very heavily in the judge's finding that Soo's request to the appellant to supply the building materials and the transportation services was made for and on behalf of KTS and not the respondent, and hence there was no privity of contract between the appellant and the respondent. These two documents were Soo's statutory declaration ('the SD') and an affidavit ('the affidavit') affirmed by him. In the statutory declaration Soo had sworn that the respondent had agreed to subcontract works in respect of the projects to KTS and another company, in which Soo was one of the shareholders and directors, on piece meal basis and thus there was no formal contract between the respondent and KTS. Soo also stated that he had never acted as the respondent's agent in respect of requesting building materials and transportation and services for the projects. In his affidavit Soo affirmed that he had used the respondent's rubber stamp, without the knowledge and authority of the respondent, to acknowledge receipt of certain materials supplied by the appellant. The trial judge founds these two documents to be consistent with the evidence of two of the respondent's witnesses, a purchasing clerk working in KTS from July 1994 to December 1994 ('DW6') and a director of the respondent ('DW7'). Based on these documents, which constituted the main pillars of the respondent's case, the trial judge held that the appellant had failed to prove his case on a balance of probabilities. The appellant filed the instant appeal against that decision.

**Held**, allowing the appeal with costs:

(1) It could not reasonably be said that the SD and the affidavit were consistent with the evidence of DW6 and DW7. DW6's reliability was questionable because she gave evidence of a very large number of documents in the form of invoices and delivery orders made some seven years earlier relying purely on her memory. Further as she was no longer in the employment of KTS after 31 December 1994, she was not in a position to give evidence on invoices and documents made in 1995. DW7 in his witness statement had admitted that not all delivery orders were acknowledged by Soo and that some delivery orders were actually accepted by the respondent's employees. Thus the learned judge had erred when he concluded that the SD and the affidavit were consistent with the evidence of DW7 (see paras 9 & 10).

(2) An examination of the circumstances under which the SD and the affidavit came about showed that Soo had made these two documents after he had agreed to help the respondent defend the appellant's claim. From the events leading up to the making of the affidavit the probability of the events narrated in the affidavit being untrue could not be ruled out. In addition, the affidavit was admitted in evidence by the court below under s 32(1)(c) of the Act. However, the real reason or motive for making the affidavit may negate the very principle upon

which the admissibility of the affidavit was based. Further, on the face of Soo's admission in the affidavit a fraud was committed on the respondent by Soo but yet several years after the fraud was discovered the respondent had not lodged a police report or taken any legal action against Soo. All these matters had escaped the scrutiny of the trial judge in considering the weight to be given to the SD and the affidavit. In the light of the circumstances under which the two documents were introduced they should not be given any weight (see paras 11–16).

(3) The evidence of the appellant was well supported by the evidence of the appellant's lorry driver and by all the documentary evidence in the form of four statements of accounts, relevant invoices and delivery orders. Further, in the respondent's list of key personnel Soo was described as the respondent's project co-ordinator and no plausible reasons were given as to why Soo was given this title if he was the project co-ordinator of KTS. The totality of all the evidence led to the inescapable conclusion that the supply of building materials and the provision of the transportation services were made at the request of the respondent and as such there was privity of contract between the appellant and the respondent (see paras 17–19).

**[Bahasa Malaysia summary**

Plaintif/perayu ('perayu') pada setiap masa yang material menjalankan perniagaan membekal bahan-bahan pembinaan dan menyediakan perkhidmatan pengangkutan, sementara responden, kontraktor bangunan dan sivil, pada setiap masa yang material dilantik sebagai kontraktor utama bagi beberapa projek ('projek tersebut'). Perayu memulakan tindakan terhadap responden bagi sejumlah RM423,103.91 untuk pembekalan bahan-bahan pembinaan dan juga perkhidmatan pengangkutan. Adalah menjadi kes perayu bahawa dia telah membekalkan bahan-bahan pembinaan dan menyediakan perkhidmatan pengangkutan kepada responden bagi projek tersebut, dari Julai 1994 hingga pertengahan Mac 1995. Perayu memplidkan bahawa permintaan responden bagi bahan-bahan dan perkhidmatan tersebut dibuat menerusi penyelaras projek responden, Soo Kock Leong ('Soo'). Responden menafikan membuat permintaan tersebut bagi projek tersebut kerana 70% daripada kerja-kerja ke atas projek tersebut disubkontrakkan kepada KTS Builders Sdn Bhd ('KTS'). Responden juga menafikan Soo adalah pekerjanya tetapi Soo merupakan pengarah KTS. Pembelaan responden adalah bahawa memandangkan permintaan yang dibuat kepada perayu bagi bahan-bahan dan perkhidmatan tersebut dilakukan oleh Soo, yang bertindak bagi pihak KTS dan bukannya responden, maka tiada priviti kontrak antara perayu dan responden. Di Mahkamah Tinggi, kes ini didengar sebahagian oleh hakim, yang telah mendengar keterangan perayu, saksinya dan juga enam saksi responden, sebelum beliau bersara. Hakim yang mengambil alih kes ini menyambung

perbicaraan kes tersebut. Semasa perbicaraan, perayu mengemukakan penyata-penyata akaun dan beberapa invois bagi bahan-bahan dan perkhidmatan yang ditandatangani oleh Soo. Walau bagaimanapun, dua dokumen diterima di bawah ss 32(1)(c) dan 73A Akta Keterangan 1950 yang tinggi nilai keterangannya dalam dapatan hakim bahawa permintaan Soo kepada perayu untuk membekalkan bahan-bahan pembinaan dan perkhidmatan pengangkutan tersebut dibuat, oleh dan bagi pihak KTS dan bukannya responden, dan oleh itu, tiada priviti kontrak antara perayu dan responden. Kedua-dua dokumen tersebut merupakan perisytiharan statutori ('SD') dan suatu afidavit ('afidavit') yang ditandatangani olehnya. Dalam SD tersebut Soo telah bersumpah bahawa responden bersetuju untuk mensubkontrakkan kerja-kerja berkaitan projek tersebut kepada KTS dan sebuah syarikat lain, yang mana Soo merupakan salah seorang pengarah dan pemegang sahamnya, secara berperingkat, maka tiada kontrak formal antara responden dan KTS. Soo juga menyatakan bahawa dia tidak pernah bertindak sebagai ejen responden apabila meminta bahan-bahan pembinaan dan perkhidmatan pengangkutan bagi projek tersebut. Dalam afidavitnya, Soo mengesahkan bahawa dia telah menggunakan cop syarikat responden, tanpa pengetahuan dan kuasa daripada responden, untuk mengakuterima beberapa bahan yang dibekalkan oleh perayu. Hakim bicara memutuskan bahawa kedua-dua dokumen tersebut konsisten dengan keterangan dua saksi responden, kerani pembelian yang bekerja dengan KTS dari Julai 1994 hingga Disember 1994 ('DW6') dan seorang pengarah responden ('DW7'). Berdasarkan dokumen-dokumen tersebut, yang menjadi tunjang utama kes responden, hakim bicara memutuskan bahawa perayu gagal membuktikan kesnya atas imbangan kebarangkalian. Perayu memfailkan rayuan ini terhadap keputusan tersebut.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Tidak wajar untuk menyatakan bahawa SD dan afidavit tersebut konsisten dengan keterangan DW6 dan DW7. Kebolehpercayaan DW6 dipersoalkan kerana dia memberikan keterangan tentang dokumen-dokumen yang banyak iaitu invois-invois dan penghantaran pesanan yang dilakukan tujuh tahun dahulu berdasarkan ingatannya semata-mata. Selanjutnya, dia tidak lagi bekerja dengan KTS selepas 21 Disember 1994, dia tidak harus memberikan keterangan berkenaan invois-invois dan dokumen-dokumen yang dibuat dalam tahun 1995. Dalam penyataan keterangannya, DW7 telah mengakui bahawa bukan semua penghantaran pesanan diakuterima oleh Soo dan beberapa penghantaran pesanan diterima oleh pekerja-pekerja responden. Oleh itu, hakim yang bijaksana telah khilaf apabila memutuskan bahawa SD dan afidavit tersebut konsisten dengan keterangan DW7 (lihat perenggan 9 & 10).

(2) Suatu pengamatan kepada keadaan-keadaan di mana SD dan afidavit tersebut dibuat menunjukkan bahawa Soo membuat dokumen-dokumen tersebut setelah dia bersetuju membantu responden membela tuntutan perayu. Daripada kejadian-kejadian yang menjurus kepada afidavit tersebut, kebarangkalian bahawa kejadian-kejadian yang dijelaskan dalam afidavit tersebut tidak benar tidak boleh ditolak tepi. Tambahan lagi, afidavit tersebut diterima sebagai keterangan oleh Mahkamah Tinggi di bawah s 32(1)(c) Akta. Tetapi, alasan atau motif sebenar untuk membuat afidavit tersebut mungkin mensia-siakan prinsip yang terpakai bagi kebolehterimaan afidavit tersebut. Selanjutnya, secara kasarnya, dalam pengakuan Soo dalam afidavitnya, suatu fraud telah dilakukan ke atas responden oleh Soo tetapi, setelah fraud itu diketahui sesudah beberapa tahun, responden tidak membuat apa-apa laporan polis atau mengambil apa-apa tindakan undang-undang terhadap Soo. Perkara-perkara ini tidak diperhatikan oleh hakim bicara dalam mempertimbangkan nilai keterangan terhadap SD dan afidavit tersebut. Melihat kepada keadaan-keadaan di mana kedua-dua dokumen tersebut dikemukakan, dokumen-dokumen tersebut tidak harus diterima sebagai keterangan (lihat perenggan 11–16).

(3) Keterangan perayu disokong oleh keterangan pemandu lorinya dan semua keterangan dokumentar iaitu penyata-penyata akaun, invois-invois dan penghantaran pesanan. Selanjutnya, dalam senarai kakitangan utama responden, Soo merupakan penyalaras projek responden dan tiada alasan-alasan munasabah diberikan mengapa Soo diberikan jawatan tersebut jika dia merupakan penyelaras projek bagi KTS. Secara keseluruhannya, keterangan menunjukkan kepada kesimpulan yang kukuh bahawa pembekalan bahan-bahan pembinaan dan penyediaan perkhidmatan pengangkutan tersebut dibuat atas permintaan responden dan oleh itu wujud priviti kontrak antara perayu dan responden (lihat perenggan 17–19).]

**Notes**

For a case on privity of contract, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) para 4745.

For cases on admissibility of documentary evidence, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1187–1201.

**Cases referred to**

*Dal Bahadur v Bijai Bahadur* AIR 1930 PC 79 (refd)
*PP v Forster Frank Edald Heinrich* [1988] 2 MLJ 594, HC (refd)
*Taylor v Witham* (1876) 3 Ch D 605; 45 LJ Ch 798 (refd)

**Legislation referred to**

Evidence Act 1950 ss 32(1)(c), 73A, 73A(6)

**Appeal from**: Civil Suit No S2(S4)–22–229 of 1995 (High Court, Kuala Lumpur)

*K Ganesan (Syed Shafiq with him) (Muhammad Ganesan & Nazri) for the appellant.*
*Sudhar (JC Lam with him) (Shook Lin & Bok) for the respondent.*

**Ahmad Maarop JCA (delivering judgment of the court):**

BRIEF FACTS OF THE CASE

**[1]** The brief facts of the case are these. The appellant (the plaintiff in the court below) was at all material times carrying the business of supplying building materials such as rocks, sand and stones. He also provided transportation services such as lorries for hire. The respondent (the defendant in the court below) was a building and civil contractor. It held a class A licence issued by the Pusat Khidmat Kontraktor, Kementerian Pembangunan Usahawan. At the material time, the respondent was appointed as the main contractor for the following projects ('the said projects'):

(a) the construction of Sekolah Sukan Negara, Bukit Jalil, Sri Petaling, Kuala Lumpur (the Bukit Jalil project);

(b) the construction of low cost flats, Seksyen 20 Shah Alam, Selangor Darul Ehsan, for Perbadanan Kemajuan Negeri Selangor (the Shah Alam project);

(c) the construction of Industrial Training Centre for handicapped people in Bangi, Selangor Darul Ehsan — Phase II (the Bangi project); and

(d) the construction of Mimos Complex Technology Park Malaysia, Bukit Jalil, Kuala Lumpur (the Mimos project).

**[2]** The appellant pleaded that at the request of the respondent, he had supplied building materials and provided transportation services to the respondent. The appellant claimed that the said request of the respondent was made through one Soo Kock Leong ('Soo') who, according to the appellant, was the respondent's project coordinator. The sum of RM423,103.91 claimed by the appellant against the respondent in this case was for the supply of building materials and the provision of transportation services to the respondent for the said projects between July 1994 to mid March 1995.

**[3]** The respondent denied requesting the appellant to supply the building materials and provide transportation services for the said projects. The respondent denied that Soo was its employee and had acted on its behalf to request for the supply of the building materials and the provision of the transportation services from the appellant. It was also the respondent's case

that almost 70% of the works on the said projects were subcontracted to KTS Builders Sdn Bhd ('KTS') in which Soo and one Tan Poh Eng were the directors. The respondent alleged that the request for the supply of the building materials and the provision of transportation services were made by Soo, who was acting for and on behalf of KTS, and not the respondent. There was therefore no privity of contract for the supply of the building materials and the provision of transportation services between the appellant and the respondent. So argued the respondent.

**[4]** In the court below the case was heard by two judges. Before going into retirement the first judge heard the evidence of the appellant ('SP1') and his witness ('SP2') as well as the evidence of six witnesses called by the respondent. The succeeding judge then continued the hearing of the case from where it was last adjourned by the first judge. He heard the evidence of two more witnesses called by the respondent after which the respondent closed its case. The learned succeeding judge then ordered both parties to file their respective written submissions. On 17 June 2004, the learned judge dismissed the appellant's case with costs. Being dissatisfied, the appellant filed an appeal to this court against that decision. Hence, the appeal before us.

## THE DECISION OF THE COURT

**[5]** In his judgment, the learned judge in the court below said that the success or failure of the appellant's claim depended entirely on his findings on the following issues:

(a) Whether the supply of the building materials and the provision of the transportation services were at the request of KTS or the respondent; and

(b) Whether Soo was an employee of KTS or the respondent.

**[6]** Commencing his discussion of the evidence led by both parties, the learned judge said that in his evidence the appellant denied having any dealing whatsoever with KTS, which denial was strongly disputed by the respondent. In this regard the learned judge referred to the evidence of DW1, a bank officer who testified that from the bank records, KTS had issued two cheques to the appellant on 5 July 1994 and 17 August 1994 in the sums of RM12,114.92 and RM86,509 respectively. The learned judge found that that evidence had not been denied by the appellant. He held that in the light of such evidence the appellant's claim that he had no dealings whatsoever with KTS could not be true:

> The plaintiff's claim that he had no dealing whatsoever with KTS was strongly disputed by the defence. DW1 ('Tan Ah Ng'), a bank officer with Union Overseas Bank ('UOB'), in his evidence, stated that he had records confirming that Lee Wah

Bank which by a court vesting order, was transferred to UOB. DW1 went on to state that from Lee Wah Bank records, KTS had issued two cheques to the plaintiff on 5 July 1994 and 17 August 1994 amounting to RM12,114.92 and RM86,509, respectively. Such evidence was not denied by the plaintiff. In the light of such evidence the plaintiff's claim that he had no dealings whatsoever with KTS could not be true. In my view such payments could be very important and very relevant evidence. It must be remembered that the plaintiff's claims was for *balance of payment* for the supply of building materials and transportation services for the period between July 1992 to March 1995. The payments made by any party to the plaintiff during this period would be regarded as the party who placed the order for the supply and services unless otherwise explained. In this case the plaintiff did not deny the payments he received from KTS. What was equally significant was that the plaintiff did not offer any evidence to say that such payment by KTS was not for the supply of the building materials and transportation charges. And the failure on the part of the plaintiff to deny receiving such payment had made him an untruthful witness when he claimed in his evidence that he had no dealings with KTS.

[7] Dealing further with the evidence given on the respondent's behalf, the learned judge considered the evidence of DW6 (a purchasing clerk working for KTS between July 1994 to December 1994) who said that the appellant used to come to KTS's office two or three times a month to collect payment for the supply of sand and lorries for hire. Next, the learned judge referred to the evidence of DW7, a director of the respondent, who said that through Soo, KTS was appointed as the subcontractor of the respondent and was given about 70% of the construction works in the said projects. According to DW7, the agreement between KTS and the respondent was that KTS would appoint its own suppliers and be solely responsible for paying them, and that as far as the respondent was concerned it had no involvement whatsoever in the appointment of KTS suppliers. We pause to say that the agreement between the respondent and KTS must have been an oral agreement since there was nothing in writing to prove the terms and conditions of KTS' appointment as one of the respondent's subcontractors. Finally, the learned judge dealt at length with Soo's statutory declaration sworn on 19 April 1995 ('D15') and Soo's affidavit affirmed on 24 November 1995 ('D16'). In the court below, the appellant had objected to these two documents being admitted in evidence. No ruling was made by the first judge on their admissibility. They were therefore marked as IDs for the purpose of identification only. In his written submission in the court below, learned counsel for the respondent urged the court to admit the two documents under ss 32(1)(c) and 73A of the Evidence Act 1950. In response, learned counsel for the appellant implored the court not to rely on the two documents as the appellant had no opportunity to cross-examine Soo. In his judgment the learned judge held both documents to be admissible under s 32(1)(c) of the Evidence Act 1950 and s 73A of the same Act. The learned judge concluded that the supply of the building materials and transportation

services requested by Soo were for and on behalf of KTS and not the respondent. The learned judge found that Soo had never been given any power to order supplies of building materials from the appellant for the respondent. This is what the learned judge said in his judgment:

> Soo had never been given any power to order supplies of building materials from the plaintiff. It could not be the case where the defendant should make order for supply of building materials because the defendant had appointed KTS to be the subcontractor for about 70% of the construction works. And Soo was a director of KTS. His affidavit and statutory declaration were consistent with the evidence of DW7, the director of the defendant and also the evidence of DW6, the former purchasing clerk of KTS. On the other hand PW1's evidence in denying that the plaintiff had any dealing with KTS had been completely rebutted by the evidence of DW1 who produced cheques issued by KTS in favour of the plaintiff. The issue whether the plaintiff had dealing with KTS was very relevant because that was the crux of the defence case. Such denial cannot be said to be accidental. In my view it was deliberately done with an intention to tell a lie in order to ensure that the defendant be found liable to the plaintiff. It was with the same purpose that the invoices were issued in the name of the defendant. However it was found as a fact that most of the invoices were signed by employees of KTS. The wrongdoing of the plaintiff with the assistance of KTS with the objective of making the defendant liable to the plaintiff had been clearly explained by Soo in his affidavit. Those facts and circumstances had convinced me to arrive at the conclusion that the story as narrated by Soo in his affidavit was true.

**[8]** In the end, the learned judge held that the appellant had failed to prove his case on the balance of probabilities:

> With the evidence given by DW6 as well as the content of Soo's affidavit and statutory declaration it would be very difficult for the court to be convinced that the plaintiff had proved his case on a balance of probabilities especially so when the plaintiff (PW1) had been found to be intentionally telling a lie as regards his relationship with KTS.

**[9]** Was the learned judge right in coming to the aforesaid conclusion? It is clear to us that D15 and D16 had weighed very heavily in the learned judge's finding that Soo's request to the appellant to supply the building materials and the transportation services was made for and on behalf of KTS and not the respondent, and hence there was no privity of contract between the appellant and the respondent. Indeed these two documents constituted the main pillars of the respondent's case. The main points in D15 are Soo's statements that the respondent agreed to subcontract works in respect of the said projects to KTS and Bayangan Abadi Sdn Bhd (of which Soo was one the shareholders and directors) on piece meal basis, no formal agreement setting out the precise terms of the subcontract was drawn up and that in all his dealing with suppliers of materials and services and other third parties in

respect of all the said projects, he had never acted as agent of the respondent. D16 was actually an elaboration and augmentation of Soo's statement in D15. The parts in D16 which are relevant to this appeal are paras 4(f) and (h):

> (f) I now crave leave to refer to the 4 statements of account and the various Invoices appearing as Exhibits 'NCK-1' to 'NCK-4' to Ng's 1st Affidavit bearing my signature. *When it became apparent that KTS Builders Sdn Bhd would not be able to make payments to the Plaintiff, the Plaintiff prepared the said Statements of Account and Invoices and together with the said Tan Poh Eng requested me to sign the same. I was told that by doing so the Plaintiff might be able to obtain direct payment from the Defendant. Without the knowledge and authority of the Defendant I then placed the Defendant's rubber stamp on the said documents without verifying them and signed them. I did not address my mind to the possible legal consequences of such an act.*
>
> (h) *I verily believe that the Plaintiff who had full knowledge of the actual arrangement between the Plaintiff and KTS Builders Sdn Bhd and between the latter and itself is trying to take advantage of a mistake on my part to obtain payment from the Defendant*. In fact it may well be that part of the Plaintiff's alleged claim is fraudulent: in February 1995 KTS Builders Sdn Bhd had prepared a list of the trade creditors of KTS Builders Sdn Bhd a copy whereof is annexed hereto and marked as Exhibit 'SKL-1'. The Plaintiff's claim against KTS Builders Sdn Bhd then stood at only RM249,574.09 as compared to the RM423,103.91 it is now claiming. *As stated earlier I did not verify the documents which the Plaintiff requested me to sign*. (Emphasis added.)

**[10]** The learned judge concluded that the story narrated by Soo in D16 was true. He found that Soo had never been given any authority by the respondent to order supplies of building materials from the appellant. He also found that D15 and D16 were consistent with the evidence of DW7 and DW6. First we deal with the evidence of DW6, who worked as a purchasing clerk for KTS from July 1994 to 31 December 1994. We find the reliability of DW6's evidence to be questionable, for, she gave evidence on the contents of not just a few but a very large number of documents in the form of invoices and delivery orders made some seven years earlier relying purely on her memory. No explanation was given as to how she could recall the contents of those documents. Further, since she was no longer in the employment of KTS after 31 December 1994, she definitely was not in a position to give evidence on the invoices and other documents made in 1995. More particularly she would not be in a position to (and indeed she did not) give evidence relating to the four statements of account which were dated 31 March 1995. Thus we do not know how it could reasonably be said that D15 and D16 were consistent with the evidence of DW6. Next, we turn to the learned judge's finding on D15 and D16 in relation to the evidence of DW7. In our view, the learned judge erred when he concluded that D15 and D16 were consistent with the evidence of DW7. The respondent's case is that it had no contractual relationship with the appellant in respect of the supply of

building materials and transportation services claimed by the appellant and that Soo was not its employee. However the respondent had to explain why the statements of account at p 72, book 1 of the appeal records (RM128,704.92), p 734, book 4 of the Appeal Records (RM40,880.15), p 927, book 5 of the appeal records (RM27,360.20) and p 1072 book 6 of the appeal records (RM226,158.64) ('the four statements of accounts') and numerous invoices as well as delivery orders had on them its rubber stamp marks. D15 and D16 were supposed to provide that explanation. In para 4(f) of D16 Soo had stated that he had placed the respondent's rubber stamp marks on the aforesaid documents without the respondent's knowledge and authority and signed them in order to assist the appellant to obtain direct payment from the respondent. Thus, on the face of it, the statement in para 4(f) in D16 appeared to provide the explanation and indeed a defence to the appellant's claim. However, we do not think Soo's alleged admission that he had used (without the respondent's knowledge and authority) the latter's rubber stamp on those documents to acknowledge receipt of the building materials mentioned thereunder provided a cogent explanation. We agree with the submission of learned counsel for the appellant that the statement of Soo in D16 was not consistent with the evidence of DW7 because DW7 in his witness statement (in answer to Q 69) had admitted that not all delivery orders were acknowledged by Soo and that some delivery orders were actually accepted by the respondent's employees. In his evidence under cross-examination DW7 could not explain why acknowledgement of acceptance of certain materials supplied by the appellant was made by the respondent's employees:

> Saya tidak dapat memberi apa-apa penjelasan mengapa *cop defendan terus digunakan untuk pengesahan penerimaan bahan-bahan yang dibekal oleh plaintif kepada defendan*. (Emphasis added.)

The question is if it is true as claimed by Soo that he had used the respondent's rubber stamp on the statements of account and invoices without the latter's knowledge and authority in order to help the appellant obtain direct payment from the respondent although the respondent did not request for the building materials and services covered by the those documents, why were some delivery orders signed by the respondent's employees?

**[11]** Next, we feel that it is necessary to examine the circumstances in which D15 and D16 came about. In his evidence DW7 admitted that after receiving the appellant's notice of demand dated 17 May 1995 he discussed with Soo about it, and that Soo agreed to help the respondent defend the appellant's claim. It is significant to note that by then according to DW7's evidence, the respondent had taken over the works which were not completed by Soo's company (KTS) and this took place on 15 March 1995, and that the respondent had paid all payment due to KTS. D15 and D16 were introduced

in evidence to challenge the appellant's application for summary judgment. D15 was introduced in evidence by DW7's first affidavit in reply (p 101 of the *rekod rayuan tambahan* 2) to reply to the appellant's supporting affidavit affirmed on 21 September 1995 (p 3 of the *rekod rayuan tambahan* 2). In that supporting affidavit, the four statements of account (on which Soo had placed the respondent's rubber stamp marks) and which formed the basis of the appellant's claim were exhibited as exhs NCK1, 2, 3 and 4. DW7's first affidavit (which introduced D15 in evidence) was affirmed on 27 October 1995. So, when DW7 affirmed his first affidavit he must have been aware of the four statements of account which had Soo's signature and the respondent's rubber stamp's marks on them. Yet DW7's first affidavit and D15 (dated 19 April 1995) mentioned nothing about Soo's unauthorised use of the respondent's rubber stamp to stamp the four statements of account. Indeed in DW7's first affidavit, DW7 said that he had no knowledge as to how the respondent's rubber stamp was used on the four statements of account. In that affidavit DW7 also said that if the said rubber stamp was indeed that of the respondent (which was denied) then the same would have been placed on the said documents by some unknown person or persons. This is surprising because by the time DW7 affirmed the affidavit he must have met Soo. However, less than a month later, in D16 which was affirmed by Soo on 24 November 1995 reference was made to the four statements of account and invoices (para 4(f)). In para 4(f) Soo explained that he was asked by the appellant and Tan Poh Eng to sign those documents and that he had, without the knowledge and authority of the respondent, stamped those documents using the respondent's rubber stamp, and then signed them. The question is if Soo's statement in para 4(f) of D16 was true, why was there no mention at all made in D15 about the event that had occurred as narrated in para 4(f) of D16? The possible answer could be that the event narrated in para 4(f) of D16 occurred after D15 was affirmed by Soo. But that could not be accepted as the plausible explanation because in D16 itself (which was affirmed and filed by Soo 'in amplification and clarification of the matters set out' in D15), there is nothing to say that the event narrated in para 4(f) of D16 had occurred after D15 was affirmed. In our view therefore, the probability of the story in D16 not being true could not be ruled out.

**[12]** D16 was admitted in evidence by the court below under s 32(1)(c) of the Evidence Act 1950. The principle upon which statements under s 32(1)(c) are regarded as admissible in evidence was explained by Lord Buckmaster in *Dal Bahadur v Bijai Bahadur* AIR 1930 PC 79 at p 80:

> *The principle upon which such statements are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true*. But this sanction is manifestly wanting in the case of a Hindu widow who, after a lifelong enjoyment of her husband's property, desires at the end to pass it on to her own relations, and for this purpose goes through the

form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband. (Emphasis added.)

**[13]** In other words, the real reason or motive for making the statement in question may negate the very principle upon which the admissibility of the statement is based. Thus, in *Taylor v Witham* (1876) 3 Ch D 605; 45 LJ Ch 798, Jessel Mr said:

... it must be prima facie against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, *if you can prove aliunde that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of evidence altogether*, but the question of admissibility is not a question of value. *The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it*, but that is a matter for subsequent consideration when you estimate the value of the testimony. (Emphasis added.)

**[14]** D16 was also ruled to be admissible by the learned judge in the court below under s 73A of the Evidence Act 1950. In this regard s 73A(6) of the same Act provides:

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, *and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts*. (Emphasis added.)

**[15]** In para 4(f) of D16, Soo said that when it became apparent that KTS would not be able to make payments to the appellant, the latter prepared the said statements of account and invoices and then, together with one Tan Poh Eng requested him (Soo) to sign the same. Soo said he was told that by doing so the appellant might be able to obtain direct payment from the respondent. So, according to Soo, without the authority and knowledge of the respondent, he placed the respondent's rubber stamp on the said documents without verifying them, and then signed them. Soo was quick to add that he did not address his mind to the possible legal consequence of such an act. Thus, if what was said by Soo in para 4(f) was true, Soo became a party to a device to defraud the respondent. It is not difficult to see the benefit accruing to Soo — the appellant would obtain payment directly from the respondent which according to Soo, was supposed to be paid by KTS (Soo's company). Then, we have the evidence of DW7 that Soo was prepared to help the respondent defend the claim brought against it by the appellant.

A This explained how D15 and D16 came to be introduced into evidence by the respondent. Admittedly there is no evidence to show how or what sort of persuasion was employed by DW7 or the respondent on Soo which resulted in Soo making the alleged admission. But the important thing is that according to DW7's own evidence, Soo was prepared to help the respondent.
B Again it is not difficult to conclude the benefit accruing on Soo. On the face of Soo's admission in D16, a fraud was committed on the respondent by Soo in cahoots with the appellant and one Tan Poh Eng. DW7's claim that Soo had used the respondent's rubber stamp without the respondent's authority and knowledge involved a large sum of money. Yet several years after the fraud
C was discovered, until the case was heard and disposed of in court, there is nothing to show that the respondent had lodged any police report or taken any legal action against Soo. Soo got away scot free!

D **[16]** All the matters which we have just discussed had escaped the scrutiny of the learned judge in the court below in considering the weight to be given to D15 and D16. It was easy for the learned judge to say that he believed Soo. But unlike the appellant, Soo's statements in D15 and D16 could not be tested in court by the process of cross-examination, and in our view this had
E severely affected the weight to be attached to the contents of D15 and D16 (see *Public Prosecutor v Forster Frank Edald Heinrich* [1988] 2 MLJ 594). In our judgment, in the light of the circumstances in which D15 and D16 came to be introduced in evidence which we have explained, it is not safe to rely on these two documents as credible basis to make finding of facts in support
F of the conclusion made by the learned judge that the appellant had failed to prove its case on the balance of probabilities. In our view, D15 and D16 should not be given any weight.

**[17]** As against the evidence adduced in support of the respondent's case,
G we have the evidence of the appellant which was supported not only by his lorry driver's evidence, but more importantly by numerous documentary evidence in the form of the four statements of accounts, the relevant invoices, delivery orders and the respondent's company profile ('P14'). In P14, under the heading 'List of key personnel', Soo was described as project coordinator.
H According to the appellant he knew Soo as the project coordinator of the respondent and that Soo had requested him to supply building materials to the sites of the said projects. Soo had, on the appellant's request given the appellant P14 and his calling card ('P10'). The appellant said that he was convinced that Soo was a project coordinator working for the respondent. So,
I he supplied the building materials to the respondent. DW7 did not dispute P14 as the respondent's company profile and that Soo was described therein as the project coordinator, but explained the role played by Soo. According to DW7, as project coordinator of KTS, Soo was in the best position to brief the representatives of the respondent's clients, discuss with them and answer

questions on technical aspects of the said projects. So the respondent gave Soo the title of project coordinator to enable Soo to deal direct with the representatives of the respondent's client:

> Oleh itu, Defendan telah memberikan Encik Soo *gelaran* Penyelaras Projek bagi membolehkan beliau berurusan secara langsung dengan wakil-wakil dan perunding-perunding klien ...

No explanation was given as to why giving Soo the title of project coordinator would enable him to deal direct with those people mentioned by DW7. What about other subcontractors of the respondent? There was no evidence to show that personnel of other subcontractors were given similar title and role as Soo. In the circumstances we do not see the need for the respondent to give the title 'project coordinator' to Soo to play the role claimed by DW7. Soo was after all KTS project coordinator. KTS was one of the subcontractors for the said project. We see no reason why Soo could not play the role explained by DW7 in his capacity as KTS project coordinator. There was therefore no necessity to list Soo as one of the respondent's key personnel in P14, unless he was one of the respondent's employees or agents.

**[18]** Apart from the evidence which we have referred to there are also documents evidencing three payments made by the respondent to the appellant. The first is the payment of RM31,197.48 on or about 23 May 1994 by way of a letter of credit pursuant to the appellant's invoice No 1209 dated 18 May 1994. The second and the third were payment of RM2,760 and RM2,640 separately made by way of Bank Bumiputra Malaysia Berhad's cheques Nos 117430 and 118358 dated 8 April 1995 and 19 April 1995 respectively. In respect of the first payment, DW7's evidence was that it was made by the respondent on behalf of KTS because on or about May 1994, KTS was having cash flow problem:

> Pada atau lebih kurang bulan Mei 1994, KTS Builders Sdn Bhd mengalami masalah aliran wang tunai. Pengarah mereka, seorang bernama Tan Poh Eng, telah menghubungi Pengarah Operasi Defendan, Tuan Haji Ismail bin Yeop Dahari untuk mendapatkan bantuan. Tan Poh Eng, telah meminta Tuan Haji Ismail supaya membuat pembayaran bagi pihak KTS Builders Sdn. Bhd. kepada Plaintif.

Since Tan Poh Eng and Hj Ismail bin Yeop Dahari were not called to give evidence, the above statement was hearsay evidence and the truth of it was not proven. As for the second and the third payments, DW7 admitted that they were in respect of transportation services provided by the appellant to the respondent but the transactions took place after the respondent had taken over part of the said projects which were not completed by KTS.

**[19]** In our judgment the totality of all the evidence given on behalf of the appellant lead to the inescapable conclusion that the supply of the building

materials and the provision of the transportation services (the payment for which was claimed by the appellant in this case) were made at the request of the respondent, not KTS. There was privity of contract between the appellant and the respondent. We find nothing to show that the learned judge in the court below had adequately considered the various matters which we have explained at length. Instead, he placed too much emphasis on what he termed as the appellant's denial of his involvement with KTS. In this regard the learned judge said the appellant's denial was rebutted by the evidence of DW1 who produced cheques issued by KTS in favour of the appellant. The learned judge concluded that the denial by the appellant was made deliberately with the intention to lie in order to ensure that the respondent be found liable to him. With respect, we cannot affirm such a finding. Having scrutinised the evidence adduced on behalf of the appellant ourselves we find that his denial of dealing with KTS was with regard to the said projects, which actually was consistent with his case that he supplied the building materials and provided the transportation services (for the said project) to the respondent, not KTS. As for the previous payment from KTS, the appellant had explained in his evidence that the payments were meant for a Hicom project, which was a separate project and had nothing to do with the said projects. This is what the appellant said:

> Projek pertama Soo dikawalnya ialah di Hicom dan saya ada bekal barang-barang. Transaksi di Hicom dengan Soo dalam kira-kira tahun awal 90an. Hicom project tidak berkenaan dengan projek-projek Defendan. Hicom project adalah projek pertama saya dengan Soo.
>
> Sebelum dari projek Defendan, saya cuma Hicom sahaja. Perniagaan dengan Hicom — jumlah saya tidak ingat.
>
> Pada masa projek Hicom, Soo Kock Leong tidak kenalkan dirinya untuk mewakili syarikat. Dengan Hicom bayaran dibuat oleh Soo Kock Leong. Bayaran dibuat syarikat Soo Kock Leong. Soo bayar cara cek. Cek-cek dikeluarkan syarikat Soo Kock Leong.
>
> Cek-cek atas nama KTS Builders.

**[20]** We find nothing in the learned judge's judgment to show that that explanation by the appellant was considered by him. Like us, the learned judge did not have the audio visual advantage of observing the appellant's demeanour in giving his evidence. So, in making his finding on the credibility of the appellant's evidence he could not rely on the demeanour of the appellant. Except for the two witnesses called by the respondent, like us the learned judge had to rely on the printed evidence and documents which form the appeal records in this case. We have considered all the evidence in the appeal records and the judgment of the learned judge very carefully. We are satisfied that if the learned judge had directed himself properly and

adequately appreciated the totality of the evidence available before him, he would not have found that the appellant had not proven his case on the balance of probabilities.

**[21]** In the result, the appeal is allowed with costs. The order of the High Court is set aside. Judgment is entered for the appellant. Deposit to be refunded to the appellant.

*Appeal allowed with costs.*

Reported by Kohila Nesan